

Vic Koenig Chevrolet and Tracy Ruble. Case 14-CA-15276

August 23, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND
MEMBERS FANNING AND HUNTER

On May 11, 1982, Administrative Law Judge James M. Fitzpatrick issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

¹ The General Counsel has excepted to the Administrative Law Judge's credibility determination between Tracy Ruble and Victor Koenig and contends that it was not based on testimonial demeanor. It is well settled that the Board will not displace an administrative law judge's credibility resolutions which are based on his observation of demeanor unless a clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Likewise, the Board has held consistently that when "credibility resolutions are not based primarily upon demeanor . . . the Board itself may proceed to an independent evaluation of credibility." *J. N. Ceazan Company*, 246 NLRB 637, 638 at fn. 6 and cases cited therein (1979). When the demeanor factor is diminished, the choice between conflicting testimony rests not only on demeanor, but also on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *El Rancho Market*, 235 NLRB 468, 470 (1978), *enfd.* 603 F.2d 223 (9th Cir. 1979). We have examined the record carefully and find no basis under either standard for reversing the Administrative Law Judge's credibility resolution. See *Garrett Railroad Car & Equipment, Inc.*, 244 NLRB 842, fn. 1 (1979).

We also note that the Administrative Law Judge misspelled lot boy Doug Knolten's name as "Knolton," rather than "Knolten." Additionally, the Administrative Law Judge erred inadvertently in stating, without qualification, that lot boys do not change batteries. Although Ruble testified initially that lot boys did not change batteries, he amended his statement by testifying subsequently that he had changed a battery once in his year of employment.

DECISION

STATEMENT OF THE CASE

JAMES M. FITZPATRICK, Administrative Law Judge: This case involves an employee who was fired during a strike when he told his employer he would only wash cars, which was less than he usually did. I find the discharge was lawful.

These proceedings began with unfair labor practice charges filed August 18, 1981,¹ by Tracy Ruble, an individual, against Vic Koenig Chevrolet (Koenig or Respondent). A Board complaint based on these charges issued September 10 alleging that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act, as amended (the Act), by discharging Ruble on August 11 and thereafter not reinstating him. Respondent answered, denying this allegation, but admitting the jurisdictional allegations in the complaint. The case was heard before me in St. Louis, Missouri, on January 13, 1982.

Based on the entire record, including my observation of the witnesses and consideration of the briefs of the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

Respondent, an Illinois corporation, is engaged at Carbondale, Illinois, as an automotive dealer in the retail sale, service, and distribution of new and used motor vehicles, parts, and related products. During the calendar year ending July 31, a period representative of its operations, Respondent derived gross revenues exceeding \$500,000 from this business and also during the same period received at Carbondale directly from points outside Illinois goods and materials valued over \$50,000. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Setting

At the time of the events involved here, Respondent's management consisted of Victor Koenig, its president and owner, Alan Rausenberger, general sales manager, Dan (Charles Daniel) Binkley, new-car sales manager, an unidentified used vehicle sales manager, an unidentified office manager, Erve Legendre and Don Schlinker, manager and assistant manager, respectively, of the service department, and an unidentified manager of the parts department. The employees included from 3 to 8 salesmen who worked under the supervision of the sales managers, 2 lot boys, Tracy Ruble and Douglas Knolton, who were supervised directly by Binkley and indirectly by Rausenberger in the sales department, 3 office employees, 11 mechanics and bodymen who worked in the service department under Legendre and Schlinker, and a parts department employee.

¹ All dates herein are in 1981 unless otherwise indicated.

The dealership's physical facilities include a showroom for new vehicles with offices for the salesmen as well as for the office staff. A covered service drive located adjacent to the sales area connects to the garage which houses the service and parts departments. Nearby parking lots are used to park new and used vehicles for sale as well as those of customers and of staff and employees.

The mechanics and parts employees spend most of their working time in the garage area. Salesmen, of course, work chiefly in and around the sales office, the showroom floor, and sometimes in the parking lots. The lot boys, who are normally under the supervision of the sales department, generally work in the service drive area but also work in all other areas of the operation as particular jobs require.

An important factual issue is the duties of the lot boys compared with those of the mechanics. In normal operations, the mechanics service and repair automobiles and trucks, including all types of engines, drive trains, suspensions, and chassis. Except for minor items, lot boys have not performed this type of work. In general terms the work of lot boys may be described as miscellaneous, light, unskilled work. As the name lot boy implies, the job involves moving vehicles in and around the service drive, parking lots, garage, and showroom areas. Lot boys also clean vehicle interiors and put them through the automatic car wash. They often change license plates, using such light tools as are necessary. They check the fluids, including those for coolant, brakes, power steering, window washer, transmission and lubrication, and if necessary replenish them. On occasion they recharge batteries but do not change batteries.² If a vehicle is out of gas, they add fuel and even prime the carburetor to get it started, part of their duties being to start all inventory cars in the parking lot each morning. If a lighting fixture needs a new bulb, they change that. When necessary they change a tire as, for example, when a tire is flat, but ordinarily do not rotate tires. On occasion they change trailer hitches. In performing these chores they use small tools such as screw drivers, pliers, and small wrenches as well as lug wrenches and impact tools in changing tires, and jacks in raising vehicles so tires can be changed. They do not do any substantial amount of mechanical work although some of their chores such as changing tires or charging batteries or replacing lightbulbs are also performed by mechanics on cars they service.

Respondent offered the testimony of Marc Lauzon, a lot boy who worked for Respondent some 4 years previously, to the effect that both he and mechanics performed minor mechanical jobs, including the changing of step bumpers on pickup trucks, the changing of batteries, the filling of batteries with acid, the adjusting of carburetors, the writing of some service tickets, and the installation on cars and trucks of electrical hookups (called pig-tails) for trailers. Even though Victor Koenig testified that lot boy duties had not changed over the years except for that resulting from the installation of the automatic car wash machine, I find that the testimony of

² In years past lot boys apparently did change batteries, but that was not a lot boy duty at the time of the events involved here.

Lauzon does not relate to a time pertinent to the issues in this case. The credible evidence of the two lot boys involved in the present matter, Ruble and Knolton, indicates they did not perform the duties above noted which Lauzon described and I find that they did not.

In addition to their duties involving vehicles, lot boys do considerable cleanup around the premises, including cleaning toilet facilities and sweeping floors in the sales area. Normally, service department employees sweep the floor in the service department areas. Although lot boys on occasion are called upon to be in the garage where mechanics work, they spend a minor amount of time there. They spend the major portion of their time in and around the service drive area, the showroom, and the parking lots. Lot boys are also available to run errands when necessary. Their wage rate is considerably less than that of mechanics.³

In contrast to the lot boys, mechanics routinely perform major mechanical jobs such as engine overhauls as well as lesser ones such as engine tuneups and tire installations. Most of their work is clearly distinguishable from work done by lot boys although there is some overlapping in the area of minor chores which mechanics routinely include when they repair or service a vehicle. Mechanics work in the garage. Lot boys, on the other hand, for the most part do not and the servicing chores on cars which they do perform are normally unrelated to more extensive service or repair jobs. In this connection it is noteworthy that lot boys work within the sales department rather than the service department which includes mechanics.

B. The Strike

For purposes of collective bargaining, Respondent's service department employees, including mechanics, have for the past 15 years been represented by Local Lodge 1242 of the International Association of Machinists. Respondent bargains with that Union through Carbondale Automobile Association, an association of automotive dealers. On August 11, 1981, the most recent collective-bargaining agreement between the Union and the Association expired and the employees represented by the Union, including Respondent's mechanics, went on strike in support of the Union's bargaining positions.⁴ On the morning of August 11 striking mechanics established a picket line in front of Respondent's premises.

When the strike began, Koenig decided to keep his operation open. He met with his supervisors in the morning to discuss how this would be accomplished. He decided that the service department would remain open with Legendre and Schlinker performing the work which mechanics normally performed. He also planned to assign a parts department employee to mechanics' work if that employee were willing. This was obviously a very small staff to carry the workload normally performed by the 11 mechanics and I infer that Koenig was interested in

³ At the time of the events involved herein, lot boys received \$3.45 per hour. Although the record does not reflect the wage rate of mechanics, credible testimony establishes that lot boys received considerably less than mechanics.

⁴ The strike continued for 2 months until a settlement was reached.

obtaining assistance in the garage from any available source, including lot boys. In his testimony, Koenig downplayed this need by saying that during the strike all that was needed in the garage, over and above the service manager and the assistant service manager, was helpers and runners. However, other evidence, notably the testimony of Knolton, indicates that Legendre was eager to make use of whatever mechanical ability stand-in employees might have. And Koenig himself made an effort to sell nonstriking employees, including the two lot boys, on the idea of working in the garage by telling them that with the expiration of the union contract the Union was no longer working, so that nonstriking employees working in the garage would not be doing anything against the strikers.

C. Reassignment of the Lot Boys

1. The Binkley request

Ruble's normal reporting time was 7:30 in the morning. On August 11, in accordance with instructions from Binkley, he reported at 8:30 a.m., by which time the mechanics had already begun picketing. Nevertheless, Ruble went into the dealership and commenced doing cleanup work.

In the meantime, Koenig was conferring with his supervisors regarding how they would operate during the strike. Following this meeting, Binkley called Ruble and Knolton into his office in the sales department. He asked them if they would work in the garage for Erve Legendre. Ruble testified that Binkley told them to report to Legendre. Although the import of the entire conversation was, in effect, that of a directive, I find, based on the mutually corroborative testimony of Knolton and Binkley, that the initial words of Binkley were couched in the form of a request. Binkley did not indicate specifically what working in the garage would entail, so Ruble interjected that he would work for Legendre doing all the things he usually did but that he would not do mechanics' work or, as he said, "turn wrenches" or anything that "went with the Union." According to the uncontradicted testimony of Ruble, Binkley indicated they would do whatever Legendre told them to do. About that time, Rausenberger joined the group. According to him, Knolton was willing to work in the garage but Ruble had difficulty accepting the reassignment, the gist of his position being that he would not be a mechanic nor a scab. According to Rausenberger, Binkley told Ruble that, although the choice was his, he ought to consider strongly what he was saying. And, according to Knolton, Rausenberger could not understand why Ruble did not want to go back and help Legendre. Ruble's recall of Rausenberger's part in the conversation is much more specific and for that reason I find his account to be accurate. Knolton had indicated that he did not wish to make either the Company or the Union mad and did not know what to do. Rausenberger then commented they were going to do what Legendre told them to do. Ruble repeated again he would do anything besides turning wrenches. This apparently annoyed Rausenberger who commented that, "You'll either do it or I got a hundred people that can do your job." This was an obvious threat

of discharge if Ruble did not do what the service manager directed him to do.⁵ Nevertheless, Ruble held his ground and repeated that that is how he felt. Rausenberger then told them to go talk with Legendre and see what he wanted them to do.

Following Rausenberger's directions, Ruble went to the garage to talk with Legendre.⁶ He was unable to locate Legendre so he went to the parts department to discuss his situation with parts salesman Brian Green. Shortly thereafter he found Legendre who asked Ruble if he knew anything about mechanics. Ruble said no. Legendre's question demonstrates the intent of management to use nonstriking employees, including the lot boys, to perform whatever mechanical work they were competent to perform, including work normally done by the striking mechanics. Ruble told Legendre how he felt about doing mechanics' work. Legendre said he would try to work it out and directed Ruble to clean up the body shop. Ruble agreed to do so because, as he testified, it was just sweeping. The body shop in the service department is normally swept by the employees in that department. However, during the strike the body shop was closed. It is clear, therefore, that Ruble was doing work which was normally done by service department employees who were on strike.

2. Koenig's request

At noon on August 11 the two lot boys ate lunch together. Near the end of their lunch period they went out to talk with the pickets. After about 10 minutes Koenig, seeing them out there, called for them to come to his office for a talk. At that point he did not know that Ruble had been working in the service department before lunch. Ruble told him they still had time left on their lunch period. Koenig told them to come in when the period was over, which they did.

In his office, Koenig asked the two lot boys to sit down and proceeded with what he described as his pep talk. According to him, he explained how the strike vote taken by the Union had been a tie vote.⁷ He said a car dealership differs from a factory in that during a strike a dealership does not close but continues to operate and, therefore, during a strike all must work together. According to Knolton who testified on behalf of Respondent, Koenig "explained to us that Erve Legendre needed help back in the garage and he asked us if we would be willing to go back and help him." Ruble testified, and I find, that Koenig also said, "I would like to explain the situation to you. When the mechanics go on strike, that abolishes the contract. So that means the Union is not working here now. If you do union work, you will not be going against them." This testimony is not specifically

⁵ There is no allegation nor contention that Rausenberger violated the Act. At the time of the hearing he no longer was employed by Respondent.

⁶ The record does not indicate specifically what Knolton did at that point.

⁷ In the course of bargaining, the Association had made an offer on behalf of the employers which the Union presented to the membership for acceptance or rejection. On this proposition the vote was tied and, lacking majority support, it was rejected. Thereafter a strike vote was taken and passed.

contradicted. For this reason and because Koenig's purpose in part seemed to be to assure the lot boys that by continuing to work and by working in the garage they would not be acting contrary to the best interests of their striking fellow workers, I find that he made it, even though neither he nor Knolton included it in their description of the conversation.

Ruble, whom Knolton described as "uptight" that day in that he was talking louder than usual, although he did not holler as described by Koenig, interrupted Koenig and, according to Knolton, "again expressed that he did not want to go back and do mechanical work and I remember him saying that he was not trained to do that, so he did not want to do it. He wanted to do what he was supposed to do as a lot boy."

Knolton did not recall what further transpired in the conversation and the versions of Ruble and Koenig conflict. According to Koenig, whom I credit, Ruble interrupted him to say that he would not do any mechanical work, that he was only going to do the work for which he was trained. He then recited specific things he would not do, including changing license plates, changing batteries, charging batteries, removing trailer hitches, or anything that required a tool or a wrench of any kind, that he was only going to do the job for which he was trained which was washing cars. The fact that at that time Respondent had an automatic car wash gives some indication of the state of Ruble's excitement. Koenig asked him specifically, "What you're telling me is that all you're going to do is wash cars?" and Ruble responded "Yes."

Intending to reprimand Ruble out of the presence of Knolton, Koenig took him out onto the showroom floor and then into a vacant office adjacent asking Binkley and Rausenberger to join him. In the private office he again asked Ruble if all he were going to do was wash cars and Ruble nodded in the affirmative. Because Binkley was not looking at Ruble at the moment he nodded, Koenig again asked him the question and again Ruble nodded. Binkley and Rausenberger corroborate Koenig in this respect. Koenig then discharged Ruble.

Ruble's account differs. Ruble testified generally that he did not refuse to do any job he had done in the past. According to him, while he was in Koenig's office in the presence of Knolton, he told Koenig he would do his regular lot boy duties and would not do any "wrench turning or union work." Koenig then asked, "Is that the way it is?" to which Ruble replied, "Yes." Koenig then took him out onto the showroom floor and into the vacant office and called in Binkley, stating to Binkley, "I want you to hear this, Dan." He then asked Ruble, "Are you going to do this work like I asked you to do?" According to Ruble he replied, "I'll do anything you tell me to do except union work." Koenig then discharged him by saying, "Okay, then, Dan. Go punch him out." I do not credit this portion of Ruble's testimony because he is contradicted not only by Koenig but also by Binkley and Rausenberger, because he was keyed up at the time and may not have had as accurate a recollection as the others, and because by his own testimony he had been advised by a friend on the picket line not to do mechanics' work, that the Union did not want him doing

mechanics' work, and that the Union would back him all the way.

After the discharge, Binkley then went to punch out Ruble's timecard and Ruble received his paycheck. Ruble then went to the parts department to use the telephone to call the Board's Regional Office. However, Koenig had followed him and prevented him from making the call, telling him he was no longer an employee and could not use the telephone. Koenig walked him to his pickup truck and he left in a huff.

Respecting his reasons for discharging Ruble, Koenig testified that he did so because Ruble refused to do his usual job and because he was insubordinate in that, instead of discussing with Koenig his reservations about working under Legendre, he just declared in adamant terms the things he would not do.

D. Analysis

The evidence demonstrates that Koenig and his supervisors wanted the lot boys to perform what amounted to struck work. This included working under the strikers' supervisor instead of their usual supervisor, working in the area where the strikers normally spent their time and where the lot boys usually spent little time, and performing whatever work that the strikers normally performed which the lot boys were capable of performing. This latter work included work similar to that which lot boys normally did themselves. Nevertheless, to the extent such similar work would have been done by mechanics but for the strike, it was struck work. Knolton acceded to management's request without question. Although Ruble had reservations which he expressed in the morning to Binkley and Legendre, he too cooperated to the extent of working in the mechanics' area and sweeping the body shop which normally was done by them. His expressed reservation was that he not turn wrenches which meant not using tools in the manner and for the type of work that mechanics usually performed. Up to that point there was no serious problem. Then the lot boys talked with the pickets during the lunch hour and were seen by Koenig. I infer that it was at the picket line that they were admonished not to do mechanics' work and were told the Union would back them all the way. Koenig, in apparent ignorance of the extent of the lot boys' cooperation in the morning, decided they needed a pep talk thereby setting the scene for a confrontation by making an issue where one might not otherwise have existed.

During the conference with Koenig, Ruble was excited. He indicated he would not do many of the jobs which Koenig could reasonably expect him to do if he were not on strike, and for that reason Koenig fired him. In substance, Ruble took the position he would do no work involving the use of tools, even though lot boys normally use some tools, not only on jobs which only they perform, but also on others which either lot boys or mechanics perform. The distinction between lot boy duties and mechanic duties is not clearcut, the categories of their respective normal duties not all being mutually exclusive, some falling in a penumbra in which both types of employees worked. Ruble in his discussion with

Koenig took an extremely restrictive view of his job, a view which eliminated from the job much of what he normally was paid for. In taking this position he unwittingly gave up the protection of the Act because he in effect was declaring his intention to engage in a partial strike thereby accepting his pay for performing only part of the job while avoiding the disadvantages of complete strike action. Koenig was therefore justified in discharging him. *Omni International Hotel*, 242 NLRB 248, 254 (1979); *F. W. Woolworth*, 204 NLRB 396, 398 (1973); *C. G. Conn, Ltd. v. N.L.R.B.*, 108 F.2d 390, 397 (7th Cir. 1939); *N.L.R.B. v. Montgomery Ward & Co.*, 157 F.2d 486, 496-497 (8th Cir. 1946); *Home Beneficial Life Insurance Company, Inc. v. N.L.R.B.*, 159 F.2d 280, 283, 284-286 (4th Cir. 1947); see also *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 254 (1939).

This is a harsh result for an individual employee, particularly one such as Ruble who is young, inexperienced, very likely unknowledgeable about labor relations, and who had friends on the picket line. The result is also unfortunate because it penalizes him more than the employees on strike who at the end of a strike enjoy rights of possible reinstatement not given him. On the other hand, a struck employer is entitled to a clearcut decision from employees either to join the strike or to work in accordance with the instructions of the employer, including performance of struck work,⁸ so long as the employer does not discriminate against employees unwilling to perform the work of the strikers. Here, management appeared to be understanding of Ruble's reservations up to the point when he made his declarations to Koenig. While it is true that on no occasion on August 11 did Ruble flatly refuse to follow a specific direction of management, it is also true that management on no occasion ordered him to perform any job which he specifically indicated he was unwilling to perform. In the circumstances it is impossible to say that he was discharged for refusing to perform struck work.

The circumstances here are distinguishable from those in *The Cooper Thermometer Company*, 154 NLRB 502 (1965), and its progeny,⁹ relied on by counsel for the General Counsel. In those cases employees who refused to perform struck work were discharged and thereby suffered discrimination, but they did not refuse, or indicate any intention to refuse, to do their usual work. The General Counsel's theory applied to the facts found herein requires extension of the *Cooper Thermometer* line of precedent beyond what the Board has thus far been willing to hold.

⁸ See *Pinaud, Inc.*, 51 NLRB 235 (1943).

⁹ Counsel for the General Counsel cites *General Tire & Rubber Co.*, 190 NLRB 227 (1971), *enfd.* 451 F.2d 257 (1st Cir. 1971); *Valmac Industries, Inc.*, 217 NLRB 580 (1975); and *Controls Division/Lexington, Ohio Plant, a Division of Essex International, Inc.*, 221 NLRB 742 (1975).

The Act and Board law do not protect the individual employee such as Ruble from being the more or less innocent victim of industrial conflict. No accommodation is made for his naivete in labor relations, for his understandable sympathy for those on the picket line, or for his excited condition. In his testimony Koenig indicated he considered Ruble insubordinate. Ruble was excited but not insubordinate. And in fact, the circumstances suggest strongly that Koenig himself was excited. These circumstances include his calling of the lot boys away from the picket line, deliverance of his pep talk without knowing how they had responded during the morning to the directions of supervisors, and his precipitous and aggressive, albeit lawful, forcing of the issue by repeatedly pressing Ruble to reaffirm the corner into which he had painted himself, and then peremptorily discharging him. There is no doubt that Ruble wanted to work on some basis and also that Koenig wanted the lot boys to work because he needed all the hands he could get during the strike. Had Koenig allowed Ruble time to settle down, events of the afternoon might have followed the pattern of the morning. They might even have been able to discuss the difficulties of clearly defining struck work and the obligation of nonstriking employees to avoid partial strikes. See *Mt. Clemens Pottery Company, et al.*, 46 NLRB 714 (1943). Instead, what happened was that Ruble took an untenable position which was unprotected in that in his efforts to avoid struck work he declared a partial strike. For that reason the complaint must be dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent, by discharging Tracy Ruble on August 11, 1981, and thereafter not reinstating him, did not commit unfair labor practices within the meaning of Section 8(a)(1) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁰

The complaint is dismissed in its entirety.

¹⁰ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.